



The following constitutes the Memorandum Decision of
the Court. Signed: August 17, 2022

A handwritten signature in black ink, appearing to read "Roger L. Efremsky", is positioned above the judge's name.

Roger L. Efremsky
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

In re	Case No. 19-40193-RLE
PACIFIC STEEL CASTING COMPANY LLC	Chapter 7
Debtor,	
<hr/>	
SARAH L. LITTLE, Chapter 7 Trustee	Adversary Proceeding
Plaintiff,	No. 19-4057-RLE
v.	
SPEYSIDE FUND, LLC, a Delaware limited liability company, et al.,	
Defendants.	

**Memorandum Decision re Speyside Defendants' Motion for Partial
Summary Judgment and Trustee's and Second Street's Joint Motion
for Partial Summary Judgment**

I. Introduction

In 2014, Second Street Properties, f/k/a Pacific Steel

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1 Casting Company ("Second Street") and its wholly owned subsidiary
2 Berkeley Properties, LLC ("Berkeley Properties") filed chapter 11
3 cases. At the time, Second Street had a collective bargaining
4 agreement (the "CBA") with its union employees and participated
5 in a multiemployer pension plan ("Local 164B" and the "MEP"). The
6 court approved Second Street's sale of its steel foundry business
7 to a new entity referred to here as Pacific Steel or the Debtor.

8 The sale was documented by an asset purchase agreement (the
9 "APA") which was structured to comply with ERISA §4204 so that
10 Second Street could avoid paying the large withdrawal liability
11 to the MEP that it otherwise faced, then estimated to be between
12 \$20 million and \$27 million (the "Contingent Withdrawal
13 Liability"). To take advantage of this special treatment, ERISA
14 required both parties to the transaction to do certain things. As
15 buyer, Pacific Steel had to post and maintain a bond payable upon
16 default to the MEP and perform in a certain manner for the five
17 pension plan years following the sale - the contingency period.
18 As seller, Second Street had to provide a deed of trust on the
19 real property owned by its wholly owned subsidiary. Second
20 Street's chapter 11 plan was also structured to comply with these
21 provisions and to satisfy the concerns of the trustees of the MEP
22 (the "MEP Trustees").

23 Before the contingency period had elapsed, Pacific Steel
24 failed to maintain the conditions for eliminating the Contingent
25 Withdrawal Liability. Pacific Steel later stopped contributing to
26 the MEP and then filed this chapter 7 case.

27 The chapter 7 trustee for Pacific Steel's estate (the
28 "Trustee") has sued the Speyside Defendants - former owners and

1 managers of Pacific Steel - alleging, in brief, that (1) under
2 the APA, Pacific Steel agreed to either assume the Contingent
3 Withdrawal Liability or to indemnify Second Street for it; and
4 (2) Pacific Steel's financial statements failed to properly
5 account for the Contingent Withdrawal Liability, in effect
6 concealing the fact that it was insolvent from inception, and
7 inflated the value of its inventory. These theories are the
8 factual premise for each of the Trustee's fraudulent transfer and
9 breach of fiduciary duty claims.

10 **II. The Competing Motions for Partial Summary Judgment**

11 Before the court are competing motions for summary judgment
12 that turn on the interpretation of the APA.

13 **A. The Speyside Motion**

14 The Speyside Fund LLC ("Speyside"), the Alcast Company,
15 Krishnan Venkatesan, Jeffrey Stone, Eric Wiklendt, Jerry Johnson,
16 Brian Holt, Steve Wessels, RataxasCo LLC, Speyside Equity LLC,
17 Kevin Daugherty, individually and as Trustee of the TD 2011 Trust
18 and the PD 2011 Trust, and Robert C. Sylvester (collectively, the
19 "Speyside Defendants") have filed their Motion for Partial
20 Summary Judgment as to Fact of Liability (the "Speyside Motion").
21 Docket Nos. 176-183.

22 The Speyside Motion is directed at the following claims
23 alleged in the First Amended Complaint. Docket No. 70 (the
24 "FAC"):

25 The second claim for breach of the fiduciary duty owed to
26 Pacific Steel against Krishnan Venkatesan, Jeffrey Stone, Jerry
27 Johnson, Brian Holt, Steve Wessels, and Kevin Daugherty
28 (identified in the FAC as the Management Defendants).

1 The seventh claim for avoidance of four-year intentionally
2 fraudulent transfers against Speyside, the Alcast Company,
3 Krishnan Venkatesan, Jeffrey Stone, Eric Wiklendt, RataxasCo LLC,
4 Speyside Equity LLC, Kevin Daugherty, the TD 2011 Trust, the PD
5 2011 Trust, and Robert C. Sylvester (identified in the FAC as the
6 Owner Defendants).

7 The eighth claim for avoidance of four-year constructively
8 fraudulent transfers against the Owner Defendants.

9 The ninth claim for avoidance of seven-year intentionally
10 fraudulent transfers against the Owner Defendants.

11 The eleventh claim for recovery of the four-year and seven-
12 year avoided transfers against the Owner Defendants.

13 The fourteenth claim for aiding and abetting breach of
14 fiduciary duty by the Management Defendants against the Owner
15 Defendants.

16 The Trustee seeks compensatory damages of \$40 million for
17 the breach of fiduciary duty claims and recovery of \$14 million
18 in allegedly fraudulent transfers.

19 The Speyside Motion is made on the grounds that the Trustee
20 cannot meet her burden of proof with respect to these claims
21 because the underlying premise for each of them is fatally
22 flawed. Each of these claims requires proof that, under the APA,
23 Pacific Steel became obligated to pay the Contingent Withdrawal
24 Liability owed by Second Street to the MEP - either directly,
25 because it was assumed, or by agreeing to indemnify Second Street
26 for it. The Speyside Defendants argue that Pacific Steel has no
27 such obligation to the MEP or to Second Street under the proper
28 interpretation of the APA and this liability belongs to Second

1 Street.

2 The Speyside Motion is supported by Declarations of Todd
3 Toral, Jeffrey Stone, Kevin Daugherty, and Israel Goldowitz.
4 Docket Nos. 180-183. The Trustee and Second Street have filed a
5 Joint Opposition supported by the Declaration of Jessica
6 Bagdanov. Docket Nos. 195, 199. They have also objected to
7 evidence in the supporting declarations of Jeffrey Stone, Kevin
8 Daugherty, and Israel Goldowitz. Docket Nos. 196-198. The
9 Speyside Defendants have filed a Reply. Docket No. 208.¹

10 **B. The Trustee's and Second Street's Joint Motion**

11 The Trustee and Second Street have filed their Joint Motion
12 for Partial Summary Judgment Regarding Pacific Steel's Assumption
13 of Second Street's Contingent Withdrawal Liability (the "Joint
14 Motion"). Docket Nos. 172-174.

15 The Joint Motion argues that the Trustee's and Second
16 Street's interpretation of the APA is the only reasonable one.
17 They claim that the APA obligated Pacific Steel to pay Second
18 Street's Contingent Withdrawal Liability. They contend that this
19 obligation rendered Pacific Steel insolvent at all relevant times
20 and Pacific Steel failed to properly account for this liability
21 on its financial statements. Because of this, the distributions
22 made by Pacific Steel to the Speyside Defendants were fraudulent
23

24
25 ¹The Trustee's and Second Street's objection to the Speyside
26 Defendants' evidence is overruled. The Stone and Daugherty
27 Declarations do not offer legal conclusions, nor are they clearly
28 and unambiguously inconsistent with their deposition testimony
and thus are not "sham" declarations. They also provide
appropriate context. The Goldowitz Declaration and report are
proper rebuttal testimony.

1 transfers or the Speyside Defendants breached their fiduciary
2 duties in enabling these transfers to be made. They also urge the
3 court to find that the doctrines of judicial and equitable
4 estoppel bar the Speyside Defendants from claiming that Pacific
5 Steel did not agree to assume or to indemnify Second Street for
6 the Contingent Withdrawal Liability. The Joint Motion is
7 supported by the Declaration of Jason Komorsky. Docket No. 174.
8 The Speyside Defendants have filed Opposition to the Joint
9 Motion. Docket No. 203. The Trustee and Second Street have filed
10 a Reply. Docket No. 205.

11 **III. Background Facts**

12 The Speyside Defendants, the Trustee and Second Street refer
13 to and rely on the following background events and documents. As
14 necessary for context, the court takes judicial notice of certain
15 documents filed in the Second Street chapter 11 case and the
16 docket in the chapter 7 case of Pacific Steel and this adversary
17 proceeding.

18 **A. Second Street's 2014 Bankruptcy Case**

19 Second Street manufactured steel castings at its plant in
20 Berkeley, California. Berkeley Properties owned the real property
21 on which Second Street operated. Many of Second Street's former
22 employees were represented by Local 164B, operating under the CBA
23 pursuant to which Second Street contributed to the MEP.

24 In March 2014, Second Street and Berkeley Properties filed
25 their jointly administered chapter 11 cases (Case Nos. 14-41045
26 and 14-41048). In its list of the twenty largest unsecured
27 creditors, Second Street identified the MEP as having a \$27
28 million contingent and unliquidated claim for Second Street's

1 withdrawal liability. Second Street Docket No. 1 at 4.

2 Second Street retained an investment banker to help it find
3 a purchaser for its steel foundry business. Second Street Docket
4 No. 157. Speyside was contacted as a potentially interested
5 party. Docket no. 181, Stone Dec., Ex. 5 (2/24/24 summary from
6 investment banker). Speyside submitted an initial indication of
7 interest. *Id.* Ex. 7. The investment banker informed Speyside that
8 participation in the MEP was a condition to purchasing the Second
9 Street foundry business. *Id.* Ex. 8. After a period of
10 negotiation, Speyside and Second Street signed the APA. Docket
11 No. 180, Toral Dec., Ex. F, APA.

12 During these negotiations, counsel for the MEP provided a
13 memo to its Trustees and Second Street's chapter 11 counsel
14 regarding Second Street's withdrawal liability as it affected
15 potential purchasers of Second Street's foundry business. Docket
16 No. 180, Toral Dec., Ex. E, 5/1/14 memo re pension plan
17 withdrawal liability issues "helpful to a potential purchaser
18 assessing a potential transaction". This analysis necessarily
19 informed Second Street's understanding of this issue for the
20 drafting of the APA and Second Street's Chapter 11 Plan.

21 This memo explained the withdrawal liability issue as
22 follows:

23 First, Second Street's share of the MEP's unfunded vested
24 liabilities was approximately \$27 million which would become due
25 in installments if Second Street withdrew from the MEP. The
26 actual present value of this was approximately \$20 million due to
27 special rules limiting a withdrawing employer's liability.

28 Second, ERISA §4204 provided a special rule that, subject to

1 certain conditions, would allow Second Street to sell its
2 business and be exempt from paying the withdrawal liability that
3 otherwise arose as a result of such a sale. These included, (1) a
4 buyer obligates itself to contribute to the MEP on terms similar
5 to Second Street's; (2) a buyer obligates itself to pay whatever
6 withdrawal liability Second Street would have paid based on the
7 year of the sale and the four preceding years but has no
8 obligation to assume seller's full withdrawal liability under
9 §4204, only that portion that relates to the last five years of
10 operations estimated at \$8 million; (3) a buyer posts and
11 maintains a surety bond for the five plan years after the sale,
12 estimated to be in the amount of \$1.4 million; (4) if a buyer
13 withdraws during the first five years after the sale, and does
14 not timely pay its own withdrawal liability, then Second Street
15 must be contractually and secondarily liable for the withdrawal
16 liability that it would have incurred for the years a buyer
17 participated in the plan; (5) if a buyer withdraws during the
18 five plan years after the sale and does not timely pay its own
19 withdrawal liability, then Second Street would be statutorily
20 liable to pay the withdrawal liability Second Street would have
21 had "but for the operation of ERISA §4204 (e.g., \$20 million);"
22 (6) if Second Street were to be liquidated or its assets
23 distributed after such a sale, it must post and maintain a bond
24 equal to the amount of its withdrawal liability for the five
25 years after the sale; and (7) if all these conditions are met,
26 Second Street "will escape all withdrawal liability if a §4204
27 sale occurs, the conditions of the rule are met, and buyer
28 remains in the plan and current with its own contributions

1 through the close of the fifth plan year." Docket no. 180, Toral
2 Dec., Ex. E, 5/1/14 MEP Trustee Memo at 2-3.

3 The MEP Trustees filed a proof of claim in Second Street's
4 bankruptcy case (the "Local 164B Claim"). Docket No. 180, Toral
5 Dec., Ex. C. The Local 164B Claim attached a memo dated June 20,
6 2014 from The Segal Company, the MEP's actuary, stating that (1)
7 \$26.7 million was an estimate of Second Street's withdrawal
8 liability assuming a complete withdrawal from the MEP during the
9 plan year ending June 30, 2014; (2) this liability could be paid
10 in quarterly installments the number of which is limited to a
11 maximum of 20 years by ERISA; (3) the annual payment for a
12 withdrawal in the 2013-2014 plan year was \$1.865 million; (4) the
13 \$26.7 million net assessment would not be fully amortized at this
14 rate and ERISA's 20-year limitation would apply reducing the net
15 assessment of \$26.7 million to its present value of \$21.1
16 million. See Ex. A to Local 164B Claim.

17 **B. The Bidding Procedures and the Sale Process**

18 On June 19, 2014, Second Street filed a Motion to Approve
19 Overbid Procedures and Related Relief (the "Bid Procedures
20 Motion"). Second Street Docket No. 201. Speyside's bankruptcy
21 counsel reviewed the language in the Bid Procedures Motion before
22 it was filed and requested certain changes which Second Street's
23 bankruptcy counsel agreed to make. Docket No. 174, Komorsky Dec.,
24 Ex. 27, 6/8/14 email from counsel with suggested revisions. The
25 initial version of the Bid Procedures Motion stated that under
26 the APA, Speyside's bid was "\$11.3 million in cash for certain
27 assets." The language Second Street agreed to add at Speyside's
28 request after that phrase was:

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1 plus assumption of certain liabilities (collectively, the
2 "Assumed Liabilities"), including (i) [Second Street's]
3 multiemployer pension plan with contingent liability
4 estimated at \$27.8 million; (ii) [Second Street's] nonunion
5 pension plan, with liability estimated at \$2.2 million;
6 (iii) specified accounts payable aggregating \$2 million;
7 (iv) specified accrued expenses for customer rebates and
8 goods/materials aggregating \$1 million; and (v) a lease of
9 real property with [Berkeley Properties], providing for rent
10 payments aggregating approximately \$16 million.

11 Second Street Docket No. 201.

12 The court entered an order approving the Bid Procedures
13 Motion and thereafter approved the sale to Pacific Steel, as
14 assignee of Speyside. Second Street Docket Nos. 220, 225, and
15 269. The sale closed on August 29, 2014.

16 **C. The Asset Purchase Agreement**

17 Certain provisions of the APA are critical to the issues
18 raised by these competing motions. Docket No. 180, Toral Dec.,
19 Ex. F, APA. First, the APA is a fully integrated contract to
20 which California law applies. See §10.03, APA supersedes any
21 prior understandings, agreements, representations by or between
22 parties that relate in any way to its subject matter; §10.09, APA
23 governed by California law and where applicable the Bankruptcy
24 Code.

25 Section 2.03 is entitled "Liabilities." Section 2.03(a)
26 begins:

27 Other than the Assumed Liabilities, Buyer shall not assume
28 or agree to pay, perform or discharge, any debts,
liabilities ... or commitments of any kind or character,
whether accrued or fixed, absolute or contingent, matured or
unmatured or determined or undetermined (collectively,
"Liabilities").

Section 2.03(b) defines the Assumed Liabilities as follows:

At closing Buyer shall assume from Seller (and pay, perform,
discharge, and otherwise satisfy in accordance with their
respective terms) the following liabilities (the "Assumed

1 Liabilities")...

2 (ii) all Liabilities of Seller arising under the Assumed
3 Contracts to the extent that such Liabilities first accrue
on or after the Closing Date...;

4 (iii) the obligations to administer or to provide benefits
5 [...] under the Benefit Plans that Buyer assumes as listed
6 on Schedule 2.03(b) (iii) (the "Assumed Plans") after the
Closing Date, and all Liability arising from Buyer's
termination of or withdrawal from any Assumed Plan ...

7 Section 2.04 is entitled "Assumption of Contracts; Cure
8 Amounts." This section deals with the assumption of certain
9 executory contracts by Second Street and their assignment to
10 Pacific Steel. Schedule 2.04 lists the CBA as an Assumed
11 Contract.

12 Section 7.10(a) is entitled "Multiemployer Plan." It
13 provides in relevant part:

14 (a) The Parties intend to comply with the requirements of
15 Section 4204 of the Employment Retirement Income Security
16 Act of 1974, as amended ("ERISA") in order to ensure that
the transactions contemplated by this Agreement shall not be
deemed a complete or partial withdrawal from [the
Multiemployer Plan]. Accordingly, Seller and Buyer agree:

17 (i) After the Closing Date, Buyer shall contribute the same
18 number of contribution base units for which Seller had an
obligation to contribute.

19 (ii) Buyer shall provide to the Multiemployer Plan, for a
20 period of five consecutive plan years commencing with the
21 first plan year beginning after the Closing Date, either a
bond issued or an amount held in escrow ...

22 (iii) If Buyer completely or partially withdraws from the
23 Multiemployer Plan prior to the end of the fifth plan year
... and Buyer's liability ... with respect to the
24 Multiemployer Plan is not paid, then Seller shall be
secondarily liable for any withdrawal liability Seller would
25 have had to the Multiemployer Plan with respect to Buyer's
operations during such five-year period but for Section 4204
26 of ERISA. Buyer shall indemnify Seller and hold Seller
harmless from and against any liability incurred by Seller
27 pursuant to Section 4204 of ERISA and this subsection (iii).

28 //

1 **D. Second Street's Chapter 11 Plan**

2 On April 30, 2015, Second Street, Berkeley Properties, and
3 their Creditors' Committee filed their Second Amended Joint
4 Chapter 11 Plan of Reorganization (the "Chapter 11 Plan" and the
5 "Plan Proponents"). Second Street Docket No. 535. The Chapter 11
6 Plan stated that the Plan Proponents had agreed with the MEP
7 Trustees on the treatment of Local 164B's Claim. The Chapter 11
8 Plan provided that (1) on the effective date, the Plan
9 Administrator shall execute a deed of trust that encumbers the
10 Berkeley real property (the "Deed of Trust") to secure payment of
11 the Local 164B Claim; (2) if Pacific Steel had not withdrawn from
12 Local 164B before July 1, 2020, or if it had withdrawn and
13 completely satisfied all resulting withdrawal liability
14 obligations to Local 164B, then the Deed of Trust would be
15 reconveyed; (3) if Pacific Steel withdrew before July 1, 2020,
16 Local 164B would deliver notice to the Plan Administrator with
17 its calculation of Second Street's withdrawal liability under
18 ERISA §4204; (4) thereafter, only the Plan Administrator could
19 contest Local 164B's calculation of the amount of Second Street's
20 withdrawal liability that may have been triggered in accordance
21 with ERISA §4219(b) and §4221; (5) if the "withdrawal liability
22 is uncontested and/or confirmed" through ERISA's dispute
23 resolution procedures, the Local 164B Claim "shall be an Allowed
24 Claim;" (6) if Pacific Steel withdrew prior to July 1, 2020 and
25 failed to make any withdrawal liability payment, and Pacific
26 Steel or the Plan Administrator failed to cure it, then Local
27 164B was entitled to exercise any and all remedies available to
28 it under the Deed of Trust; and (7) the Chapter 11 Plan's

1 provisions regarding the Deed of Trust were the sole source of
2 recovery for the Local 164B Claim and the Deed of Trust satisfied
3 Second Street's requirement to post a bond under ERISA
4 §4204(a)(3).² Second Street Docket No. 535, Chapter 11 Plan, §VI.
5 D.

6 Second Street, its Creditors' Committee, and the MEP
7 Trustees also entered into a stipulation regarding the treatment
8 of the Local 164B Claim (the "Stipulation"). Second Street Docket
9 No. 559. The Stipulation recited that it was intended to clarify
10 what was perceived to be an ambiguity in the Chapter 11 Plan's
11 treatment of the Local 164B Claim and its rights under the Deed
12 of Trust. The Stipulation (1) defined Pacific Steel's failure to
13 post the bond required for §4204 treatment by the June 30, 2015
14 deadline as a "Buyer's Withdrawal;" (2) stated the Chapter 11
15 Plan was to be construed so that Local 164B's rights and remedies
16 "upon the triggering of withdrawal liability under ERISA, applied
17 to a Buyer Withdrawal;" and (3) the rights of the Second Street
18 Plan Administrator applied to a Buyer Withdrawal in the same
19 manner as they would to "any other withdrawal liability
20 triggered." ³

21 In June 2015, the court entered an order confirming the
22

23 ²ERISA §4204(a)(3) provides that if substantially all of the
24 seller's assets are distributed, or it is liquidated before the
25 end of the 5 year period, then the seller shall provide a bond or
amount in escrow equal to the present value of the withdrawal
liability the seller would have had but for this subsection.

26 ³Second Street's confirmation brief stated that, pursuant to
27 ERISA, if its case were converted to ch. 7, it would be liable
28 for the Contingent Withdrawal Liability owed to the MEP. Second
Street Docket No. 581, ¶25. It is silent as to the APA.

Chapter 11 Plan. Second Street Docket No. 589.

E. Pacific Steel's Operations and its Chapter 7 Case

Pacific Steel obtained the bond required for its compliance with ERISA §4204(a)(1)(B) and contributed to the MEP pursuant to the CBA which it had assumed under the APA. Pacific Steel operated the steel foundry business from August 2014 until late 2018.

In December 2017, the surety that had provided the bond canceled it. The MEP Trustees then gave notice to Pacific Steel and Second Street that this was an event of default ending the ERISA §4204 exemption and the MEP intended to exercise its rights under the Deed of Trust. Docket No. 180, Toral Dec., Ex. D, 12/28/17 MEP Trustees' demand letter. This prompted Second Street to send a demand letter to Pacific Steel stating that the indemnity obligation under §7.10 of the APA had been triggered. Docket No. 181, Stone Dec., Ex. 18, 1/23/18 Second Street demand letter.

In January 2019, Pacific Steel filed its chapter 7 case and the Trustee was appointed. Second Street timely filed its proof of claim asserting Pacific Steel owed it \$24.2 million on the grounds that Pacific Steel had agreed to indemnify Second Street for the Contingent Withdrawal Liability by the APA. Claim 2-1 on Pacific Steel Claims Register.⁴

On November 4, 2019, the Trustee filed the complaint commencing this Adversary Proceeding and thereafter filed the

⁴ The precise amount of the Contingent Withdrawal Liability is the subject of another motion. Docket Nos. 178, 200, 201, 207.

1 FAC. The Defendants have answered and completed discovery.

2 **IV. Discussion**

3 **A. Summary Judgment Standard**

4 Rule 56 of the Federal Rules of Civil Procedure, applicable
5 here by Bankruptcy Rule 7056, provides that a party may move for
6 summary judgment, identifying each claim or defense - or the part
7 of each claim or defense - on which summary judgment is sought.
8 Fed. R. Civ. P. 56(a). Further, Rule 56(a) provides that the
9 court shall grant summary judgment if the moving party shows that
10 there is no genuine dispute as to any material fact and the
11 moving party is entitled to judgment as a matter of law. Summary
12 adjudication may be granted as to a single issue of law based on
13 undisputed facts or a single issue which is part of a larger
14 claim. *Robi v. Five Platters, Inc.*, 918 F.2d 1439 (9th Cir. 1990)
15 (summary judgment granted based on application of collateral
16 estoppel); *Van Curen v. Bank of the West (In re Hat)*, No. 04-
17 32497, 2007 WL 2580688 (Bankr. E.D. Cal. Sept. 4, 2007) (summary
18 adjudication granted on issue of perfection of security
19 interest).

20 Where the moving party has the burden of proof on an issue
21 at trial, it must affirmatively demonstrate that no reasonable
22 trier of fact could find other than for it. *Celotex v. Catrett*,
23 477 U.S. 317, 323 (1986). Where the non-moving party will have
24 the burden of proof on an issue, the movant need only demonstrate
25 that there is an absence of evidence to support the claims of the
26 non-moving party. *Id.* at 324. If the moving party meets its
27 initial burden, the non-moving party must set forth specific
28 facts showing there is a genuine issue for trial. *Anderson v.*

1 *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

2 Where the parties have filed cross-motions for summary
3 judgment, the court evaluates each motion independently, viewing
4 the non-moving party's evidence in the most favorable light and
5 giving the non-moving party in each instance the benefit of all
6 reasonable inferences. *Lenz v. Universal Music Corp.*, 815 F.3d
7 1145, 1150 (9th Cir. 2016) (quoting *ACLU v. City of Las Vegas*,
8 333 F.3d 1092, 1097 (9th Cir. 2003)).

9 The motions currently before the court are not styled as
10 cross-motions but they are in effect cross-motions and the court
11 has dealt with them as such. With respect to the Speyside Motion,
12 the court has viewed the Trustee's and Second Street's opposition
13 evidence in its most favorable light and viewed all reasonable
14 inferences drawn from this opposition evidence in the same
15 manner. The converse is also true. With respect to the Joint
16 Motion, the court has viewed the Speyside Defendants' opposition
17 evidence and reasonable inferences drawn from it in the most
18 favorable light.

19 The Speyside Defendants seek summary judgment on the FAC's
20 fraudulent transfer and breach of fiduciary duty claims on the
21 grounds that the Trustee's liability theory is fatally flawed
22 because she cannot meet her burden of proof on the core part of
23 each of them. They argue their record establishes they are
24 entitled to judgment as a matter of law because the Trustee and
25 Second Street misinterpret the APA and misunderstand applicable
26 law.

27 The Trustee and Second Street seek summary judgment without
28 pointing to any particular claim alleged in the FAC. Instead,

1 they contend that they are entitled to summary judgment because,
2 under what they contend is the correct interpretation of three
3 provisions of the APA and the parties' course of dealing, Pacific
4 Steel agreed "to assume by way of indemnification" the Contingent
5 Withdrawal Liability. They also contend that the principles of
6 judicial and equitable estoppel support summary judgment in their
7 favor.

8 **B. Contract Interpretation Principles**

9 The fundamental goal of contract interpretation is to give
10 effect to the mutual intent of the parties as it existed at the
11 time of contracting. *U.S. Cellular Inv. Co. v. GTE Mobilnet,*
12 *Inc.*, 281 F.3d 929, 934 (9th Cir. 2002); Cal. Civ. Code §1636
13 (contract is to be interpreted to give effect to mutual intent of
14 parties as it existed at time of contracting so far as same is
15 ascertainable). The language of a contract is to govern its
16 interpretation, if the language is clear and explicit, and does
17 not involve an absurdity. Cal. Civ. Code §1638. The parties'
18 intent is to be ascertained from their writing alone if that is
19 possible. Cal. Civ. Code §1639. The court is to view the entire
20 contract and give effect to every part of it with each clause
21 helping to interpret the others. Cal. Civ. Code §1641. If
22 particular clauses are inconsistent with general clauses, the
23 particular are to control. Cal. Civ. Proc. Code §1859; *Kashmiri*
24 *v. Regents of University of California*, 156 Cal.App.4th 809, 834
25 (2007) (specific promise not to raise fees controls over general
26 statement that fees may be raised at any time without notice;
27 interpretation that renders one provision meaningless is to be
28 avoided).

1 Generally speaking, the execution of a contract supersedes
2 all negotiations and stipulations concerning its subject matter
3 which preceded its execution. Cal. Civ. Code §1625. In addition,
4 as codified in California, the parol evidence rule provides that
5 the terms of an integrated contract, such as the APA, may not be
6 contradicted by evidence of a prior agreement but they may be
7 explained by course of dealing, or course of performance, and
8 evidence of the circumstances under which the contract was made
9 or to which it relates may be admissible. Cal. Civ. Proc. Code
10 §1856. Finally, for the proper construction of a contract, the
11 circumstances under which it was made, including the situation of
12 its subject and the parties, may be shown so the court may be
13 placed in the position of those whose language it is
14 interpreting. Cal. Civ. Proc. Code §1860.

15 While the parol evidence rule generally prohibits the
16 introduction of any extrinsic evidence to vary, alter or add to
17 the terms of an integrated contract, it does not prohibit the
18 introduction of extrinsic evidence to explain the meaning of a
19 written contract if the meaning urged is one to which the
20 contract terms are reasonably susceptible. *Casa Herrera, Inc. v.*
21 *Beydoun*, 32 Cal.4th 336, 343 (2004). Extrinsic evidence is not
22 admissible to create ambiguities where none exist and a contract
23 is not made ambiguous because parties disagree as to its meaning.
24 *Int'l Bhd. of Teamsters v. NASA Servs., Inc.*, 957 F.3d 1038, 1044
25 (9th Cir. 2020); *Wei Suen v. Yan, (In re Yan)*, 381 B.R. 747, 755
26 (N.D. Cal. 2007) (explaining parol evidence rule, noting
27 extrinsic evidence especially improper where contract is
28 integrated).

1 Under California law, when the parties dispute the meaning
2 of the words used in a contract, the court may first
3 provisionally receive any proffered extrinsic evidence that is
4 relevant to prove a meaning to which the language of the contract
5 is reasonably susceptible. *Pacific Gas & E. Co. v. G.W. Thomas*
6 *Drayage, etc. Co.*, 69 Cal.2d 33, 39-40 (1968). If, in light of
7 the extrinsic evidence, the language is reasonably susceptible to
8 an interpretation urged by one party, the extrinsic evidence may
9 be admitted to aid the court in interpreting the contract. *Id.*

10 When there is no material conflict in the relevant extrinsic
11 evidence, the court interprets the contract as a matter of law.
12 If there is a conflict in the extrinsic evidence, the factual
13 conflict is to be resolved at trial and summary judgment or
14 adjudication may not be appropriate. *Lust v. Animal Logic Ent.*,
15 2021 WL 6618677, at *5 (C.D. Cal. Aug. 25, 2021).

16 **C. Parties' Positions on the Use of Extrinsic Evidence**

17 The parties agree that the interpretation of the APA will
18 determine the outcome of these competing motions. The Speyside
19 Defendants argue that the APA is clear and explicit and extrinsic
20 evidence need not be considered other than to provide context.
21 Nevertheless, they claim that if the court does consider it, it
22 fails to accomplish what the Trustee and Second Street suppose.
23 Docket No. 203 at 24-33. They also protest that the Trustee and
24 Second Street want their proffered extrinsic evidence to rewrite
25 the APA by adding language to reach the result they desire.
26 Docket No. 176 at 30.

27 The position of the Trustee and Second Street is somewhat
28 baffling. They claim the APA is clear and unambiguous but they

1 also urge the court to consider their proffered extrinsic
2 evidence. Docket No. 172 at 2, APA is not ambiguous; *id.* at 21:8-
3 13, APA clearly provides that Pacific Steel must indemnify Second
4 Street and competent extrinsic evidence is offered to support
5 this reasonable interpretation; *id.* at 29:11-15, at a minimum the
6 language of APA §7.10(a)(iii) is ambiguous and should be informed
7 by extrinsic evidence. They do not explain how §7.10(a)(iii) of
8 the APA is ambiguous - if they do in fact contend that it is.
9 They simply insist their extrinsic evidence shows they are
10 correct.

11 The Trustee and Second Street urge the court to consider the
12 following extrinsic evidence: (1) the Bid Procedures Motion and
13 the Kevin Daugherty Declaration supporting it; (2) the Speyside
14 letter of intent and the evolution of the offers made by Speyside
15 and the fact that Speyside became the stalking horse bidder; (3)
16 the Speyside Defendants' internal discussions regarding the
17 transaction and the MEP withdrawal liability issues, including
18 the anticipated chapter 7 filing; (4) the ownership structure for
19 Pacific Steel adopted by the Speyside Defendants; (5) the
20 Stipulation regarding the Chapter 11 Plan's treatment of the
21 Local 164B Claim. Docket No. 172 at 29-35; Docket No. 195 at 20-
22 25; Docket No. 205 at 22-23; Docket No. 174, Komorsky Dec., Exs.
23 2, 8, 10, 11, 13-15, 18, 19, 21, 23, 25-29, 31-35, 37-39, 43-46,
24 48-50, 55, 58;⁵ Docket No. 195, Bagdanov Dec.

25 The Trustee's and Second Street's apparent misunderstanding
26 _____

27 ⁵ Several of these exhibits were referred to by counsel at
28 oral argument rather than these briefs. The court has considered
them.

1 of California law and their internally inconsistent position on
2 the need for extrinsic evidence has made this a more difficult
3 task than it should be. Because their position appears to be that
4 §7.10(a)(iii) of the APA is ambiguous, the court has
5 provisionally accepted the extrinsic evidence offered by the
6 Trustee and Second Street and considered whether it shows a
7 meaning to which §7.10(a)(iii) of the APA is reasonably
8 susceptible.

9 The court concludes that the APA is not reasonably
10 susceptible to the interpretation the Trustee and Second Street
11 desire: that Pacific Steel agreed to "take on" the Contingent
12 Withdrawal Liability either directly, by assuming it, or
13 indirectly, by agreeing to indemnify Second Street for it. (Nor
14 does their proffered extrinsic evidence establish that Pacific
15 Steel or the Speyside Defendants are subject to judicial or
16 equitable estoppel.)

17 The pre-deal negotiations and the offers are simply not
18 relevant. *Casa Herrera, Inc. v. Beydoun*, 32 Cal.4th 336, 344
19 (2004) (written contract supersedes communications that preceded
20 its execution). The Speyside Defendants' pre-deal communications
21 amongst themselves are also irrelevant; they were not shared with
22 Second Street or its professionals. *Steller v. Sears, Roebuck &*
23 *Co.*, 189 Cal.App.4th 175, 184-85 (2010) (undisclosed intent or
24 understanding of a party is irrelevant). This proffered extrinsic
25 evidence does not support their contention that Pacific Steel
26 agreed to "take on" the Contingent Withdrawal Liability in order
27 to become the stalking horse bidder. See APA §7.02, Bankruptcy
28 Court Matters; Docket No. 181, Stone Dec., Ex. 15, 5/16/14 email

1 re agreement between buyer and seller to cooperate in obtaining
2 stalking horse status; Bid Procedures Motion at 16-18, Second
3 Street explaining that protection of stalking horse bidders is
4 the price paid for enjoyment of best of both worlds - a
5 contractually bound purchaser on one hand and potential for
6 better bids with enhanced benefit to estate on other hand.

7 The language added to the Bid Procedures Motion by
8 Speyside's counsel merely stated what the court views as an
9 accurate description - the buyer was agreeing to assume the CBA
10 and participate in the MEP, and there was a seller's Contingent
11 Withdrawal Liability of \$27 million as Second Street's own
12 schedules showed. There was no "representation" by Speyside in
13 this language, as the Trustee and Second Street argue, and it was
14 not designed to chill bidding in the sale process. (If anything,
15 it appears to have been designed to justify the potential break-
16 up fee the parties had negotiated. See Bid Procedures Motion at
17 16.)

18 The ownership structure adopted by the Speyside Defendants
19 for the Pacific Steel entity reflects risk averse business
20 planning, it does not show an awareness of a liability and a
21 design to evade it. See Docket No. 181, Stone Dec., ¶19,
22 explaining reasons to "adopt legally cognizable deal structures
23 to prudently manage the risk of potential control group liability
24 relating to Pacific Steel's potential *buyer* withdrawal
25 liability".

26 The court has considered whether this proffered extrinsic
27 evidence shows the APA is reasonably susceptible to the meaning
28 urged by the Trustee and Second Street and concludes it does not.

1 If the court had gone beyond provisionally admitting it, the
2 result would be the same. The court now considers the parties'
3 respective views on the interpretation of the APA.

4 **D. Section 2.03 of the APA**

5 **1. Section 2.03(a)**

6 Section 2.03(a) of the APA provides:

7 Other than the Assumed Liabilities, Buyer shall not assume
8 or agree to pay any debts, liabilities, obligations, claims,
9 expenses, taxes, commitments of any kind of character,
10 whether accrued or fixed, absolute or contingent, matured or
unmatured or determined or undetermined (collectively,
Liabilities) of Seller or become liable to Seller or any
other Person, for any liabilities of Seller.

11 The Trustee and Second Street argue that this provision
12 "necessarily provides" an indemnification flowing from Pacific
13 Steel to Second Street for any Assumed Liability, and if an
14 Assumed Liability were triggered, Second Street had the right to
15 seek to have Pacific Steel "protect it" from such an Assumed
16 Liability. Docket No. 172 at 22. From this starting point, they
17 contend that whether Pacific Steel agreed to indemnify Second
18 Street for the Contingent Withdrawal Liability turns on whether
19 the Contingent Withdrawal Liability "is subsumed" in any of the
20 subsections of §2.03. *Id.* Oddly, they claim §2.03(b)(ii) deals
21 with the CBA and §2.03(b)(iii) deals with the MEP but they also
22 claim there is no redundancy in this.

23 The court disagrees with their interpretation of §2.03(a).
24 This section does not *necessarily* provide for *any* indemnification
25 for any liability. It merely establishes what is excluded from
26 the Assumed Liabilities.

27 //
28

1 **2. Section 2.03(b)(ii)**

2 Section 2.03(b)(ii) of the APA provides, “[a]t Closing,
3 Buyer shall assume from Seller (and pay, perform, discharge, and
4 otherwise satisfy...) all Liabilities of Seller arising under the
5 Assumed Contracts to the extent that such Liabilities first
6 accrue on or after the Closing Date...”

7 The Trustee and Second Street posit that (1) the CBA was an
8 Assumed Contract and the CBA required Pacific Steel to accept and
9 be bound by the terms of the MEP; (2) pursuant to §2.03(b)(ii),
10 Pacific Steel agreed to pay all Liabilities arising under the CBA
11 that accrued post-closing; (3) this necessarily included the
12 Contingent Withdrawal Liability because it *accrued* in 2017 when
13 the bond was canceled, ending Second Street’s ERISA §4204
14 exemption.

15 They claim their interpretation is in line with the position
16 of the MEP Trustees as stated in the proof of claim filed in
17 Pacific Steel’s case. Docket no. 174, Komorsky Dec., Ex. 49,
18 Proof of Claim 23-2 (\$30 million claim “arises under ERISA and
19 the CBA” and Pacific Steel “became subject to all the terms and
20 conditions of the Trust Agreement establishing the Pension Fund
21 by assuming and entering into the CBA”).⁶

22 In response, the Speyside Defendants point out that the
23 Trustee has vacillated on this point. The FAC relied on this
24 “direct assumption” theory as did the Trustee’s first motion for
25

26 ⁶As originally filed, this claim was for Pacific Steel’s own
27 \$6 million withdrawal liability. It was later amended to add \$24
28 million described as a “pre-acquisition” withdrawal liability
“assumed by” Pacific Steel under the APA.

1 summary judgment. *See, inter alia*, FAC ¶12, Pacific Steel
2 responsible for full amount of withdrawal liabilities in excess
3 of \$32 million per APA; ¶53, Pacific Steel assumed liability per
4 APA; Docket No. 83, MSJ at 7-10, Pacific Steel assumed but failed
5 to account for Contingent Withdrawal Liability of \$27 million and
6 was primarily liable for it under §7.10 of APA. The Trustee later
7 disclaimed this theory in her interrogatory responses, stating
8 that Pacific Steel did not directly assume Second Street's pre-
9 acquisition withdrawal liabilities, and her prior approach was
10 based on a mistaken reading of the APA. Docket No. 180, Toral
11 Dec., Ex. A at 27, "Neither the APA nor any other agreement made
12 [Pacific Steel] directly liable for the pre-acquisition
13 withdrawal liabilities. Rather, the obligation remained with
14 [Second Street] and was secured by the deed of trust. But [Second
15 Street] protected itself by means of the contractual
16 indemnification and hold harmless provision..."

17 The Trustee is bound by the more recent description of her
18 understanding of the APA in her verified interrogatory answers.
19 Second Street is not so constrained but the Trustee may not
20 simply ride Second Street's coat-tails on this point.

21 The Speyside Defendants argue that while the CBA was an
22 Assumed Contract listed on Schedule 2.04(a), the MEP was not. The
23 CBA only obligated Pacific Steel to contribute to the MEP which
24 it did. Docket No. 176 at 25. They also argue that the Contingent
25 Withdrawal Liability does not *arise under* the CBA; it arises
26 under the provisions of ERISA governing Second Street's
27 withdrawal from the MEP. Docket No. 203 at 23:11-12. This is
28 perhaps too fine a distinction and the court notes that the

1 Speyside Defendants also argue that the MEP was assumed. Docket
2 No. 203 at 28:18-21; Docket No. 181, Stone Dec. ¶8, ¶39.

3 The Trustee's and Second Street's argument regarding
4 §2.03(b)(ii) is not convincing. The language of §2.03(b)(ii)
5 itself does not support their expansive interpretation - the
6 Contingent Withdrawal Liability did not *arise under* an Assumed
7 Contract and did not *first accrue* after the Closing date. It is
8 not an Assumed Liability as that term is defined in the APA. The
9 Contingent Withdrawal Liability had *accrued* before the APA was
10 signed - i.e., it was properly chargeable to Second Street - but
11 it was not yet payable because its payment was dependent on a
12 future event that may never have happened. ERISA §4204 allowed
13 its payment to be deferred and possibly eliminated. It is not an
14 Assumed Liability that first accrued post-closing.

15 3. Section 2.03(b)(iii)

16 Section 2.03(b)(iii) provides "[a]t Closing, Buyer shall
17 assume from Seller (and pay, perform, discharge, and otherwise
18 satisfy...) the obligations to administer or to provide benefits,
19 ... under the [Assumed Plans] after the Closing Date, and all
20 Liability arising from Buyer's *termination of or withdrawal* from
21 any Assumed Plan." Schedule 2.03(b)(iii) lists the "Local 164B
22 Pension Trust" along with several other benefit plans as Assumed
23 Plans.

24 The Trustee and Second Street argue that the "ordinary
25 meaning" of this section is that the MEP was an Assumed Plan and
26 the Contingent Withdrawal Liability arose from the cancellation
27 of the bond in December 2017 which then eliminated Second
28 Street's ERISA §4204(a) treatment and "triggered" the Contingent

1 Withdrawal Liability. Docket No. 172 at 25-26. They contend that
2 the Speyside Defendants want to give a "hyper-technical"
3 interpretation to the "indemnification obligation" in this
4 section by reading ERISA terminology into the phrase "Buyer's
5 termination of or withdrawal from" an Assumed Plan. Docket No.
6 172 at 25:20-21.

7 The Speyside Defendants counter that this section merely
8 states that Pacific Steel agreed it would be liable for its
9 termination of its *own* participation in, or its *own* withdrawal
10 from, any of the several benefit plans it had assumed in the
11 transaction. This point is confirmed by the fact that, in May
12 2019, the Pension Trust filed a proof of claim, based on its
13 authority under ERISA §4201, asserting Pacific Steel owed it \$6
14 million (calculated under ERISA §4202 and §4219 for time period
15 2014 - 2018) resulting from Pacific Steel's "complete withdrawal"
16 from the MEP which occurred when it ceased to operate in 2018 and
17 filed its chapter 7 case in January 2019.

18 After considering their respective arguments, the court
19 concludes that Pacific Steel's withdrawal liability arose when
20 Pacific Steel withdrew from the CBA and stopped contributing to
21 the MEP. Second Street's withdrawal liability arose during, and
22 had accrued during, the time it participated in the MEP. It had
23 fully accrued as of 2014 when it sold its foundry business to
24 Pacific Steel; its payment was made contingent by operation of
25 ERISA §4204. The Contingent Withdrawal Liability did not *arise*
26 *from* Pacific Steel's termination of or withdrawal from any
27 Assumed Plan; it arose from - it originated from - Second
28 Street's participation in the MEP and remained contingent under

1 ERISA §4204's safe-harbor provision until the bond was canceled
2 in December 2017. It did not *arise from* Pacific Steel's
3 *withdrawal* from the MEP. Second Street was relieved of paying its
4 own withdrawal liability in 2014 and would have been permanently
5 relieved if the conditions for the §4204(a) exemption had been
6 maintained for the five-year statutory period. However, in 2017
7 when the bond was canceled, the §4204 exemption ended. The
8 contingency was not removed by Pacific Steel's withdrawal from or
9 termination of any Assumed Plan.

10 The Trustee and Second Street argue that Stipulation between
11 Second Street, its Creditors' Committee, and the MEP shows that
12 the Speyside Defendants' interpretation is wrong. Under the
13 Stipulation, Pacific Steel's failure to post the bond by June 30,
14 2015 is defined as a "Buyer Withdrawal." The Trustee and Second
15 Street claim this Stipulation was served on Defendants and they
16 failed to respond to contest this definition. They claim this now
17 defeats Defendants' argument that Pacific Steel's withdrawal
18 liability arose in 2019 when it filed bankruptcy and Second
19 Street's seller withdrawal liability was "triggered" in 2014 when
20 the sale took place and then became non-contingent in 2017 when
21 Pacific Steel's bond was canceled.

22 The court does not find this argument compelling. First, the
23 Speyside Defendants had no obligation to respond to the
24 Stipulation or contest its provisions and they are not, in any
25 sense, bound by it. The transaction documented by the APA had
26 closed in August 2014 and Pacific Steel's (and Speyside's) active
27 participation in Second Street's chapter 11 case had essentially
28 ended. Second, the Stipulation was executed in connection with

1 obtaining the MEP Trustees' support for confirmation of the
2 Chapter 11 Plan. If the bond had not been provided by the
3 deadline, Second Street's withdrawal liability would have become
4 an immediate liability and the MEP Trustees could have exercised
5 their rights under the Deed of Trust. Confirmation of the Chapter
6 11 Plan would have been in jeopardy if this had transpired. The
7 definition in the Stipulation made sense for the context for
8 which it was drafted but it is not binding on the Speyside
9 Defendants and it is not helpful in the interpretation of the APA
10 or the relevant provisions of ERISA. The Stipulation does nothing
11 to advance the Trustee's and Second Street's case.

12 The Trustee and Second Street argue there are three
13 indemnification provisions in the APA. Docket No. 172 at 21:8-13.
14 This argument has no merit. If §2.03(b)(ii) and (b)(iii) are
15 interpreted as broad indemnification provisions as they contend,
16 this offends core principles of contract interpretation. First,
17 it makes §7.10(a)(iii) meaningless. *Zalkind v. Ceradyne, Inc.*,
18 194 Cal.App.4th 1010, 1027 (2011) (court is to give effect to all
19 contract terms, and avoid rendering some meaningless). Second, it
20 makes §7.10(a)(iii) superfluous or redundant. *Pauma Band of*
21 *Luiseno Mission Indians v. California*, 813 F.3d 1155, 1171 (9th
22 Cir. 2015) (court declines interpretation that would render a
23 clause superfluous). Third, the more specific indemnity provision
24 in §7.10(a)(iii) controls over the general provisions of
25 §2.03(b)(ii) and (b)(iii) which are focused on an entirely
26 different subject matter. Reading the APA as a whole, with each
27 provision in mind, shows that this interpretation does not hold
28 up. There are not three indemnification provisions in this APA.

1 **E. ERISA §4204 and APA §7.10(a)**

2 Under ERISA §4201, Second Street's sale of its foundry
3 business to Pacific Steel would have been treated as a complete
4 withdrawal from the MEP, making Second Street immediately liable
5 for the \$27 million shown in the Pension Trust's proof of claim
6 filed in Second Street's bankruptcy case. To avoid this result,
7 the parties structured the sale to comply with ERISA §4204(a). In
8 order to achieve this result, §4204 required the following:

9 First, Pacific Steel had to contribute to the MEP for
10 substantially the same number of "contribution base units" as
11 Second Street had. §4204(a)(1)(A). Section 7.10(a)(i) stated
12 "after the Closing Date, Buyer shall contribute" as so required.
13 Pacific Steel made these payments while it operated. This is not
14 in dispute.

15 Second, Pacific Steel had to provide the bond payable to the
16 MEP in the requisite amount and maintain it for a period of five
17 plan years. §4204(a)(1)(B). Section 7.10(a)(ii) tracked the
18 language of §4204(a)(1)(B). Pacific Steel timely obtained the
19 bond in the required amount but did not maintain it for the
20 requisite number of years. There is no dispute as to this. When
21 the bond was canceled in December 2017, the §4204 exemption
22 ceased to apply. There is no dispute as to this.

23 Third, under §4204(a)(1)(C), the APA had to provide that,
24 if the purchaser withdraws during such first 5 plan years,
25 the seller is secondarily liable for any withdrawal
26 liability it would have had to the plan with respect to the
operations (but for this section) if the liability of the
purchaser with respect to the plan is not paid.

27 Section 7.10(a)(iii) also tracked this language in its first
28 sentence:

1 if Buyer ... withdraws [from the MEP] ... prior to the end
2 of the fifth plan year ... and Buyer's liability [to the
3 MEP]... is not paid, then Seller shall be secondarily liable
4 for any withdrawal liability Seller would have had [to the
5 MEP] ... with respect to Buyer's operations during such
6 five-year period but for Section 4204 of ERISA.

7 However, §7.10(a)(iii) added the following sentence: "Buyer shall
8 indemnify Seller and hold Seller harmless from and against any
9 liability incurred by Seller pursuant to Section 4204 of ERISA
10 and this subsection (iii)."

11 This last sentence of §7.10(a)(iii) is the focus of the
12 parties' dispute. However, there are two other provisions of
13 §4204 that inform the outcome of this dispute.

14 Section 4204(a)(2) provides that -

15 If the purchaser -

16 (A) withdraws before the last day of the fifth plan year
17 beginning after the sale,
18 and

19 (B) fails to make any withdrawal liability payment when due,
20 then the seller shall pay to the plan an amount equal to the
21 payment that would have been due from the seller but for
22 this section.

23 There is also no dispute regarding the fact that Pacific Steel
24 failed to make a "withdrawal liability payment when due" as shown
25 by the \$6 million proof of claim filed by the MEP Trustees in
26 this case. This section also indicates there remains a seller
27 obligation.

28 Section 4204(b)(1) defines the amount of the purchaser
liability as follows:

For the purposes of this part, the liability of the
purchaser shall be determined as if the purchaser had been
required to contribute to the plan in the year of the sale
and the 4 plan years preceding the sale the amount the
seller was required to contribute for such operations for

1 such 5 plan years.⁷

2 According to the Speyside Defendants, under §4204(a)(1)(C),
3 Second Street had secondary liability for Pacific Steel's
4 purchaser liability as defined in §4204(b)(1). They argue that
5 the indemnification obligation imposed on Pacific Steel by the
6 last sentence of §7.10(a)(iii) extends only to Second Street's
7 secondary liability for that "five plan year" piece, not the
8 entire \$27 million Contingent Withdrawal Liability. Docket No.
9 176 at 30.⁸

10 The Speyside Defendants also argue that Second Street's
11 secondary liability under §4204(a)(1)(C) - for which there is
12 indemnification - only exists where Pacific Steel, as the buyer,
13 withdraws while the §4204(a) conditions are in still in effect.
14 Here, the parties agree that the conditions for the §4204
15 exemption ended in 2017 and there appears to be no dispute that
16 Pacific Steel withdrew from the MEP months after that. The
17 Speyside Defendants contend "since Pacific Steel never incurred a
18 purchaser liability under §4204(a)(1)(C) by withdrawing when the
19

20 ⁷See *Borden, Inc. v. Bakery & Confectionery Union & Indus.*
21 *Int'l Pension*, 974 F.2d 528, 530 (4th Cir. 1992) (explaining
22 background regarding ERISA rules for multiemployer plan
23 withdrawal liability; for purposes of determining the purchaser's
24 withdrawal liability at some time after the sale, the statute
25 treats the purchaser "as if" it had been required to contribute
26 to the plan in the plan year of the sale and the four preceding
27 plan years in the amount that the seller was required to
28 contribute, thus shifting primary liability from the seller to
the purchaser).

26 ⁸They also point out that the indemnification only applies
27 to liability incurred by Second Street "pursuant to §4204" and
28 §4204 itself does not impose the seller liability on Second
Street. The seller liability is based on ERISA §4201 and §4203.

1 exemption was in force, Second Street cannot be secondarily
2 liable for any such *purchaser* liability (and cannot have any
3 liability that Pacific Steel must indemnify)." Docket No. 176 at
4 31:13-16; Docket No. 183, Goldowitz Report, ¶33-35.

5 The MEP counsel's June 2014 memo provided to Second Street
6 and its Creditors' Committee supports this analysis. Docket No.
7 180, Toral Dec., Ex. E, buyer has "no obligation to assume"
8 Second Street's "full withdrawal liability under §4204, only that
9 portion of it that relates to the last five years of operations."
10 The Segal memo of March 2014 provided to Speyside as part of its
11 due diligence process is in accord. Docket No. 181, Stone Dec.,
12 Ex. 3, seller's unfunded vested benefits assigned to buyer are
13 between \$3.4 million and \$11 million based on certain
14 assumptions; noting there could be residual responsibility for
15 seller. Jeffrey Stone, Speyside's lead negotiator in this
16 transaction, confirms this was his understanding as well. Docket
17 No. 181, Stone Dec., ¶6, explaining his understanding was that
18 the APA's indemnification provision did not apply or extend to
19 any withdrawal liability, contingent or otherwise, resulting from
20 Second Street's operations pre-dating Pacific Steel's acquisition
21 of Second Street's foundry business; ¶12, noting that if the
22 exemption criteria were not met "Second Street would be liable
23 for its pre-acquisition withdrawal liability..."⁹

24 The Speyside Defendants also argue that the plain meaning of
25

26 ⁹Docket No. 174, Komorsky Dec., Ex. 35 (8/14/14 email Stone
27 to Wessels) does not contradict this, it simply indicates
28 awareness of calculations for *seller's* withdrawal liability and
potential *buyer's* withdrawal liability.

1 the last sentence of §7.10(a)(iii) is that Pacific Steel agreed
2 to indemnify Second Street for any liability that Second Street
3 could have incurred pursuant to *both* §4204 and subsection (iii).
4 Only one liability could meet that definition - Second Street's
5 secondary liability for Pacific Steel's theoretical purchaser
6 withdrawal liability that would arise under §4204 if Pacific
7 Steel withdrew within five plan years.

8 The Trustee and Second Street have suggested that the last
9 sentence of §7.10(a)(iii) should be read as "pursuant to §4204
10 *and/or* this subsection (iii)" rather than "*and* this subsection
11 (iii)." Docket No. 180, Toral Dec., Ex. B, hearing transcript
12 40:19-25, suggesting "and" be read as "and/or." The court rejects
13 this suggestion as it would amount to a significant change to the
14 APA. The Trustee and Second Street also argue that the "and" in
15 this sentence "reaffirms" that Pacific Steel will be liable for
16 the Contingent Withdrawal Liability and the "going forward
17 liability."¹⁰ Docket No. 172 at 28:16-21. The court finds this
18 interpretation untenable. The language "reaffirms" no such thing.

19 The Trustee and Second Street also argue that this last
20 sentence was "plainly intended to cover the only two liabilities
21 that could have been incurred" by Second Street - those in
22 §7.10(a)(ii) and (a)(iii). Docket No. 172 at 27:22-27. Section
23 7.10(a)(ii) does not impose a liability, it simply conforms to
24 the requirement in §4204(a)(1)(B) that Pacific Steel maintain the
25 bond for five plan years. They urge the court to interpret
26

27 ¹⁰ The use of this vague terminology when ERISA provides
28 definitions that cover this situation is not helpful.

1 "pursuant to §4204 and this subsection (iii)" as a reference to
2 §7.10(a)(ii) because it "identifies §4204" and "embraces" the
3 Contingent Withdrawal Liability. Docket No. 172 at 28:16-21.
4 Section 7.10(a)(ii) "identifies" §4204 only in that tracks the
5 language of §4204(a)(1)(B). Finally, they contend that unless
6 "pursuant to Section 4204" is read as a reference to §7.10(a)(ii)
7 it is rendered meaningless.

8 This interpretation defies common sense, ignores the
9 language of these provisions, and is contrary to basic rules of
10 contract interpretation. Saying §7.10(a)(ii) "embraces" the
11 Contingent Withdrawal Liability is wishful thinking. By the last
12 sentence of §7.10(a)(iii), Pacific Steel agreed to indemnify
13 Second Street for any liability that Second Street could have
14 incurred pursuant to *both* §4204 *and* subsection (iii). The only
15 liability that meets that definition is Second Street's secondary
16 liability for Pacific Steel's purchaser withdrawal liability that
17 could have arisen if Pacific Steel withdrew within the five-year
18 period while the §4204 exemption was in place.

19 The Speyside Defendants point out that the Chapter 11 Plan
20 provided that only the Second Street Plan Administrator could
21 object to the amount of the Local 164B Claim. Second Street
22 Docket No. 535, Chapter 11 Plan, §VI. D. This weighs against the
23 Trustee's and Second Street's argument that the Contingent
24 Withdrawal Liability - upon which the Local 164B Claim is based -
25 belonged exclusively to Pacific Steel.

26 The APA was signed in June 2014 and the Chapter 11 Plan was
27 confirmed in June 2015. The court may consider the subsequent
28 acts and conduct of the parties in order to determine their

1 intent. *Warner v. City of Los Angeles*, 2 Cal.3d 285, 296 (1970)
2 (construction given by acts of parties with knowledge of contract
3 terms before controversy arises). If the Contingent Withdrawal
4 Liability were solely Pacific Steel's under the APA, as the
5 Trustee and Second Street now contend, precluding Pacific Steel
6 from being involved in resolving the actual amount makes little
7 sense. In fact, Second Street has objected to the face amount of
8 the Contingent Withdrawal Liability asserted by the MEP Trustees.
9 Docket No. 180, Toral Dec., Ex. D, 12/28/17 MEP Trustees' default
10 letter; Ex. H, 1/29/18 Second Street response to default letter
11 disputing amount of the assessment.

12 After careful consideration of the parties' arguments
13 regarding ERISA §4204 and §7.10(a)(iii) of the APA, the court
14 concludes that §4204(a)(1)(C) only imposes a single liability
15 subject to indemnification - Pacific Steel's purchaser liability
16 calculated under §4204(b)(1). However, the obligation to save
17 Second Street from its secondary liability for this purchaser
18 liability would only exist if the §4204 safe-harbor conditions
19 remained in place at the time Pacific Steel withdrew from the MEP
20 in 2019. But these safe-harbor conditions had ended in 2017 when
21 the bond was canceled. The indemnification provision in the last
22 sentence of §7.10(a)(iii) only covers Second Street's secondary
23 liability for this theoretical purchaser liability for which
24 Pacific Steel was primarily liable. If Second Street had become
25 secondarily liable to the MEP by statute, it could have sought
26 indemnification from Pacific Steel by contract. The court finds
27 the Speyside Defendants' interpretation of §7.10(a) far sounder
28 than the Trustee's and Second Street's.

1 **F. Estoppel Issues**

2 The Trustee and Second Street argue that judicial and
3 equitable estoppel apply in this case to preclude the Speyside
4 Defendants from prevailing in their interpretation of the APA.
5 Docket No. 172 at 15-20; Docket No. 195 at 6-10; Docket No. 205
6 at 6-10. The Speyside Defendants contend that these estoppel
7 theories have no merit. Docket No. 176 at 34-35; Docket No. 203
8 at 33-35; Docket No. 208 at 13-15.

9 Judicial estoppel is an equitable doctrine which the court
10 has discretion to apply in certain circumstances. *New Hampshire*
11 *v. Maine*, 532 U.S. 742, 750 (2001). In general, it may be applied
12 where (1) the party's later position is clearly inconsistent with
13 its earlier position; (2) a court has been persuaded to accept
14 the party's earlier position; and (3) the party will derive an
15 unfair advantage or impose an unfair detriment on the other party
16 if not estopped. *Id.* at 751.

17 The Trustee and Second Street argue the inconsistent
18 position and court acceptance elements of judicial estoppel are
19 present because Speyside's counsel asked to add language to the
20 Bid Procedures Motion and the court approved the Motion. Docket
21 No. 172 at 16:5-25, referring to counsel's email suggesting
22 changes to Bid Procedures Motion and stating six times on one
23 page that Defendants "took on" a \$27 million liability based on
24 this added language. They claim the court accepted this
25 "representation."

26 The court finds this argument meritless. The Speyside
27 Defendants' current interpretation of the APA is not clearly
28 inconsistent with this language added to the Bid Procedures

1 Motion. Speyside suggested adding this language and Second
2 Street's chapter 11 counsel agreed. This did not amount to a
3 representation that was accepted by the court. While Speyside may
4 have been a party in interest with respect to the Bid Procedures
5 Motion, with a right to be heard under Bankruptcy Code §1109(b),
6 the other Speyside Defendants were not and none of them were
7 parties to the chapter 11 case in the true sense of the word. The
8 added language simply stated what the MEP Trustees had said: The
9 Contingent Withdrawal Liability was estimated at the time to be
10 roughly \$27 million. The added language was purely descriptive;
11 it does not provide "evidence of their affirmative misconduct" as
12 the Trustee and Second Street claim. Docket No. 205 at 9:2-6.
13 This language does not amount to a representation by Speyside
14 that it "took on" the Contingent Withdrawal Liability and in
15 approving the Bid Procedures Motion the court did not accept the
16 Trustee's and Second Street's interpretation of this language.
17 The Speyside Defendants' current position is not "clearly
18 inconsistent" with a prior position. The Trustee's and Second
19 Street's reliance on *In re CFB Liquidating Corp.*, 581 B.R. 317
20 (Bankr. N.D. Cal. 2017), *aff'd*, 591 B.R. 396 (N.D. Cal. 2018) is
21 misplaced on both the facts and the law.

22 The Trustee and Second Street next contend that Speyside
23 will obtain an unfair advantage if its current position is
24 accepted. They posit that the added language served to chill the
25 bidding, and they claim it effectively did so because there were
26 no other bidders. The court disagrees. There may have been many
27 reasons why there were no other bidders. Their reliance on the
28 deposition testimony of Jeffrey Stone as support for this

1 proposition is misplaced. Docket No. 172 at 17; Docket No. 174,
2 Ex. 48, Stone Tr. 70-74.

3 The Trustee's and Second Street's argument for equitable
4 estoppel is equally flawed. *City of Oakland v. Oakland Police and*
5 *Fire Retirement Svs.*, 224 Cal.App.4th 210, 239-40 (2014) (listing
6 four elements generally required). In the exercise of its
7 discretion, the court declines to apply either estoppel theory
8 here.

9 **III. Conclusion**

10 For the foregoing reasons, the court grants summary judgment
11 in favor of the Speyside Defendants as to the second, seventh,
12 eighth, ninth, eleventh and fourteenth claims for relief stated
13 in the First Amended Complaint. The Speyside Defendants have
14 shown there are no genuine issues of material fact as to the
15 proper construction of the APA. Pacific Steel did not directly
16 assume an obligation to pay the Contingent Withdrawal Liability
17 and its indemnification obligation was limited as the Speyside
18 Defendants contend. As a matter of contract interpretation they
19 have negated an essential element of the Trustee's case: that the
20 APA required Pacific Steel to indemnify Second Street for its
21 Contingent Withdrawal Liability or that the APA required Pacific
22 Steel to assume the Contingent Withdrawal Liability. Accordingly,
23 the court denies the Joint Motion of the Trustee and Second
24 Street. The court requests that the Speyside Defendants submit an
25 order conforming to this decision.

26 The court also notes that this ruling provides a basis for
27 granting the pending motion for summary judgment by UHY, LLP as
28 it effectively disposes of the aiding and abetting breach of

1 fiduciary duty claim asserted in the FAC against UHY, LLP. The
2 court requests that UHY, LLP submit an order conforming to this
3 decision.

4 The court will hold a status conference regarding resolution
5 of the remaining claims in the First Amended Complaint and the
6 pending motions at 11:00 a.m. on September 29, 2022. The parties
7 shall submit status conference statements explaining their views
8 on resolution of the remaining claims in this adversary
9 proceeding at least seven days before the status conference.

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11 * * * * **End of Memorandum Decision** * * * *
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1 Court Service List

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3 None required.

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